

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 3, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CHARLES ST. JOHN CHUBB, EXECUTOR, AND OTHERS,
vs.
THE UNITED STATES.

1. The petition of the claimant.
2. Miscellaneous Document of the House of Representatives No. 74, 30th Congress, 1st session, agreed to be read in evidence, and transmitted to the House of Representatives.
3. Two letters from the Secretary of the Navy, transmitted to the House of Representatives.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this third day of February,
[L. S.] A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the United States Court of Claims:

The petition of Charles St. John Chubb, executor of the last will and testament of Lewis Warrington, Philip F. Voorhees, John Percival, Herman Thorn, and Eliza Hamilton, administratrix of the estate of C. B. Hamilton, most respectfully represents: That on the 29th of April, 1814, the officers and crew of the United States sloop-of-war Peacock (Lewis Warrington being then commander of the Peacock,

John B. Nicholson being lieutenant of said vessel, Philip F. Vorhees being then a lieutenant of said vessel, Herman Thorn being then purser of said vessel, John Percival being then sailing-master of vessel, and C. B. Hamilton being surgeon of said vessel) captured, after a well-contested action, his Britannic Majesty's sloop-of-war Epervier, and conducted her with her crew into the port of Savannah. That she was there libelled, and decreed by the district court of the United States as "prize of war to the captors," the decree of the court being, as shown by a certified copy thereof from the records of that court, herewith filed, being exhibit A in the accompanying printed documents, at page 7 of said exhibit, as follows, viz: "It is ordered, adjudged, and decreed, that the said sloop-of-war Epervier, her tackle, apparel, guns, and other implements of war, be condemned as prize of war to the captors, and sold, after due notice, by the marshal, and the proceeds be distributed as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges." The Epervier had on board certain specie, which was also decreed by said court (as shown by said exhibit A, on page 15) as "prize of war to the captors, to be distributed." "The captors" were the persons mentioned as above in this petition, and the other officers and the crew. But Mr. John Eppinger, the marshal, after selling the Epervier and receiving the proceeds, made the mistake of paying one-half thereof, and one-half of the specie captured in the Epervier, into the treasury of the United States; and the object of this petition is to make a respectful application that *this*, their property, be restored to them.

The law of the United States passed April 23, 1800, directs, respecting captures, as follows: "The proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the *SOLE property of the captors*."

That the Epervier was of "equal force" to the Peacock is shown as follows: The law of July 16, 1798, shows that the "*force*" of a vessel is the number of guns, which law is as follows: "*Be it enacted, &c., That the sum of six hundred thousand dollars shall be, and hereby is, appropriated to enable the President of the United States to cause to be built and equipped three ships or vessels, to be of a force not less than thirty-two guns each, and of the dimensions and model which he shall deem most advantageous,*" &c. That the Epervier was of equal force to the Peacock is officially shown by the *United States*, as follows: The Secretary of the Navy, in an official report to the Senate, dated March 14, 1814, transmits a table of the names, rates, &c., of the vessels of the United States navy, of which exhibit B is an extract, in which the force of the Peacock is shown to be eighteen guns; and said Secretary, in an official report to the Senate, dated October 3, 1814, transmits the official report of the commander of the Peacock of the capture of the Epervier, of which exhibit C is a copy, in which the Epervier is officially stated to be of the force of *eighteen* guns. Also, the official report of Lieutenant John B. Nicholson of her arrival, exhibit D, proves her to be of the force of *eighteen* guns. Thus the Peacock and Epervier being proved by the United States *official* reports

to be of "equal force," "the proceeds of" the *Epervier*, and "the goods taken on board," were, in the language of said law, "the sole property of the captors;" and therefore the decree of the court, as above mentioned, that the *Epervier* and specie was "prize of war to the captors" was in accordance with said law and said official report of the Navy Department.

Three other official communications of the Navy Department demonstrate that it was the decision of that department that the captors possessed the sole interest in the *Epervier*, viz: One of June 11, 1814, exhibit F, states: "In respect to your prize, the *Epervier*, * * *

* * * I am ready to negotiate with any agent authorized by the captors for the purchase of the *Epervier*." This communication does not state for the half of the *Epervier*, but for the *Epervier*, thereby expressing the whole of the *Epervier*. The communication of June 16, 1814, exhibit G, states: "It is, however, proper that the prize and her stores should be preserved in good order for the 'benefit of the captors;'" thus stating for the benefit of the captors, not for the benefit of the captors and the United States jointly. The letter of the Navy Department of July 24, 1814, exhibit H, states: "I regret that no agent for the captors has yet appeared to negotiate with this department for the sale of the *Epervier*." This letter does not state for the captors' half of the *Epervier*, but for "the *Epervier*," thereby expressing the whole of the *Epervier*.

But the marshal, Mr. John Eppinger, after selling the *Epervier* and receiving the proceeds of the sale, made the mistake of paying one-half of the same, and one-half of the specie captured, into the treasury of the United States, as shown by the receipts of James Marshall, cashier, at page 17 of exhibit A, and as also shown by the official statement of said John Eppinger, marshal, dated August 12, 1814, exhibit I; and, but for your petitioners being away at sea at the time, contending for their COUNTRY'S rights in neglect of their own, they would have prevented this mistake.

That their title to it was a VESTED right, which, so far from being divested by the mistake of the district marshal in paying it into the treasury, instead of to the captors, could not be divested even by the extensive power of Congress itself, is shown by the solemn decision of the Attorney General of October 17, 1820, in another prize case, at page 296 of published "Opinions of Attorneys General," as follows: "In my opinion, Congress intended nothing more by this act than to substitute the \$255,000 in lieu of the proceeds of the sale of the prize vessels, had they been sold under the decree of court, without the most distant intention of affecting, in any manner, the mode of distribution, either as to the quantum or the persons authorized to take; indeed they COULD NOT, IF THEY HAD INTENDED IT, have produced such an effect, because that would have been to DIVEST A VESTED RIGHT."

By the capture the memorialists furnished a valuable vessel, at a time when needed, to the government, and a considerable amount in specie when its credit was low, and they cannot believe that the nation, under all these circumstances, will withhold this debt due them.

The petitioners respectfully represent that these proceeds thus, 1st, by law solemnly enacted to be "the sole property of the captors;"

2d, thus solemnly decreed by the court to be *their property*; 3d, thus shown by the United States official report and law to be a capture from an "equal," and thus a *vested right* acquired by the captors to the whole; and 4th, admitted by the Navy Department in three official communications to be *their property*—*is their property*. They therefore petition your honors that this their property be restored to them, in accordance with the constitutional provision, "nor shall private property be taken for public use without just compensation."

Since this claim has been before Congress, two unfavorable reports (one in the Senate by the committee asking to be discharged) have been made in relation to it, but they were made in consequence of the want of the principal testimony in support of it; since, however, the official testimony has been obtained from the records of the United States court of Georgia, and official correspondence from the Navy Department, *no* adverse report has ever been made. On the contrary, since this official testimony has been obtained, the Senate have, at three different sessions, unanimously passed bills for the relief of the claimants; and the Committee of Naval Affairs of the House of Representatives have made a favorable report three times, which were not reached; all of which will fully appear by the documents accompanying Senate bill No. 35, on the calendar of the House of Representatives, referred by a resolution of that House to your honorable Court.

The action in Congress on this claim is as follows, viz: On May 2, 1836, memorial referred in Senate to Committee on Naval Affairs, and nothing done. On January 9, 1837, referred in Senate to Committee on Naval Affairs, and nothing done. On March 21, 1838, referred in Senate to Committee on Naval Affairs, and on July 7, 1838, committee discharged from further consideration of it. In 28th Congress, 1st session, on January 23, 1844, in the House of Representatives, memorial was referred to Committee on Naval Affairs, which, on February 28, 1844, made an adverse, vide page 505 of Journal. In 30th Congress, 1st session, on April 26, 1848, as vide its Journal, page 735, bill No. 435 was reported, and memorial and documents accompanying ordered to be printed, being Miscellaneous Document No 74, and not reached on the calendar. In 31st Congress, 1st session, Committee on Naval Affairs reported bill No 210, and report No. 202, vide page 728 of its Journal; and at same session, Senate bill No. 121 passed Senate on August 19, 1850, as vide page 564 of its Journal; and as House bill No. 210 had been previously referred to Committee of the Whole, bill 564 was referred to Committee of the Whole, and bill not reached for debate. In 31st Congress, 2d session, on March 3, 1851, Mr. Schenck moved, as vide page 438 Journal, Committee of the Whole be discharged from further consideration—ayes 69, noes 48, not two-thirds; and on same day Mr. Meade made same motion, but not two-thirds. Being the last working day of the session, there was an intense pressure of the public business, and *still there was a very large majority* in favor of Committee of the Whole being discharged, which discharge, as is well known to your honorable Court, *is considered as a test question*, and shows that *the sense of a very large majority was for its passage*. In 31st Congress, 2d session, bill No. 38 passed Senate on February 7, 1852, as vide its

Journal, page 188, and on February 12, 1852, as vide House Journal, page 345, was referred to Committee on Naval Affairs; which Committee, though desirous to report the bill, was not reached in the call of committees for reports by the Speaker, during the *only remaining* 19 days of the session. In the 33d Congress, 1st session, bill No. 35 passed the Senate, as vide its Journal, page 107, on January 17, 1854; and this bill was reported favorably in the House of Representatives on June 13, 1854, vide page 997 of its Journal, but not reached for debate in consequence of the pressure of the public business before the House of Representatives. And, as in duty bound, your petitioners will ever pray.

Your petitioners further show that their respective shares in the said prize money, under the act of Congress, remain their property respectively, and that no other persons are interested therein.

CHARLES ST. JOHN CHUBB,

Executor of the last will of Lewis Warrington.

PHILIP F. VOORHEES.

JOHN PERCIVAL.

HERMAN THORN.

ELIZA HAMILTON,

Administratrix of the estate of C. B. Hamilton.

By ISAAC N. COFFIN.

DISTRICT OF COLUMBIA, }
Washington county, } ss.

Before me, a justice of the peace in and for said county, on this fifth day of May, 1856, personally appeared Isaac N. Coffin, agent of the above named petitioners, and made oath that the facts stated in the said petition are true to the best of his knowledge and belief.

B. K. MORSELL, *J. P.*

NO. 585.—IN THE COURT OF CLAIMS.

L. WARRINGTON'S REPRESENTATIVES ET AL. *vs.* THE UNITED STATES.

Brief of United States Solicitor.

In April, 1814, the British sloop-of-war *Epervier* was captured by the United States ship *Peacock*. The *Epervier* was sent into Savannah, Georgia, condemned as a prize of war, and sold by the marshal, who paid half the proceeds into the treasury and distributed the remaining half among the officers and crew of the *Peacock*. He made the same disposition of the specie found on board the *Epervier*, amounting to nearly \$120,000.

The petitioners allege that the marshal erred in paying any portion of the money to the United States; that the two vessels were of equal force, which fact, under the act of April 23, 1800, entitles the captors to the entire proceeds of the captured vessel and goods on board; and

that, moreover, the vessel and money were condemned to the captors by the decree of the district court condemning the same.

The evidence in this case consists of the proceedings of the district court and official documents connected with the transaction at the time.

I. As to the alleged equality of force.

It is admitted that the Peacock and Epervier were both rated as vessels of 16 guns, the guns being 32-pounders, and that the Peacock was borne on the Navy Register as a 16-gun ship.

It is, however, stated in a letter from Mr. Toucey, Secretary of the Navy, dated May 7, 1857, that both vessels at the time of the capture carried more guns than they were rated at—the Epervier having 18 and the Peacock 22. The crew of the Epervier numbered 128 men; that of the Peacock 160 men.

The petitioners argue that the guns were the measure of force, citing the act of July 16, 1798. This may be admitted, but the act does not determine whether the guns which measure the force are the guns for which the vessel is rated or the guns which she actually carries. If the direction contained in the act to build vessels “of a force not less than 32 guns each” would not be satisfied unless by piercing the ship for 32 guns and mounting them on the gun deck, in addition to any guns that might be mounted on the spar deck, then the position would be sustained; but no authority for such a construction of the act is shown.

It is admitted that in the several cases cited for petitioner the officers and crews of the United States vessels received the entire proceeds of the British vessels captured by them, although the latter at the time of the capture carried fewer guns than the former. It is also admitted that the district court, in condemning the Macedonian, declared she was of equal force with the United States, whereas, in fact, the United States carried most guns. But the disparity in guns does not appear on the record. We know not on what evidence as to force the court proceeded.

II. As to the operation of the decree.

1st. The decree condemns the Epervier as prize of war to the captors. It is admitted that this form of decree in the British prize courts carries the property in the vessel to the officers and men who made the capture.

But we contend that this operation is due to the terms of the British prize act, which gives the captured vessel itself to the captors and reserves no part whatever to the crown.—(Lord Camden *vs.* Home, 2 H. B., 533, and Statute in 1 H. B., 197.) Whereas, our prize act disposes of “the proceeds” only, not of the vessel. The right of the prize being in the United States, can be disposed of only by law, and the decree of the court could not carry the property in the vessel of the captors. Prize is a technical term to express a legal capture, (Ship Resolution, 2 Dall., 1,) and under the provisions of our prize act the

decree must therefore be understood to declare the vessel a legal capture.

2d. But the effective part of the decree is that which directs the sale of the vessel and the distribution of the proceeds "as the law directs respecting captures made by public armed vessels of the United States." It is argued by petitioners' counsel that this distribution must be confined to those to whom the vessel was condemned; and, again, that the word "distribution" does not properly apply to a division of equal moieties between two parties. We answer that distribution is a word of general signification, comprehending any rate of apportionment whatever, as in distribution by executors, &c. Nor is distribution confined to those to whom the vessel is condemned, for the vessel may be [and the court said should be] condemned to the United States, while the proceeds are to be distributed.—(*Dos Hermanos*, 2 Wh., 76.)

We contend that the decree makes the act of Congress the rule of distribution, and does not qualify it in any respect. The question of distribution does not arise before condemnation. The conflicting claims of persons entitled to share should be settled after condemnation.—(*The Amiable Isabella*, 6 Wh., 1.)

III. *As to the proceedings after the decree.*

But the United States may claim under the decree itself. We admit that the term "captors" in the act directing distribution includes only officers and men of the capturing vessels. But this construction may be due to the context, not the force of the term itself, and a different sense is attached to it by writers on admiralty law, (Note to 2 Wh., Sup. Ct. Reports, p. 427 and *passim*,) and by the courts. Captures by privateers are generally, if not always, condemned to the captors, which, of course, must include the owners. The brig *Ernstern*, 2 Dall., 34; Brig *Gloucester*, 2 Dall., 37; The *Rapid*, 8 Cranch, 155; The *Alexander*, Id., 169; The *Sally*, Id., 382, afford examples of this, and in the case of the *Gloucester* the court said that under the form of privateer's commissions the ship and crew were captors. "The ship is figuratively considered as an agent, and represents the owners." And again: "The ship, captain, officers, and crew were joint tenants of the right to capture and make prizes conceded by the commission." The same reasoning applies to national vessels. Their commission is by law. The right to capture is in the ship, not in the officers commanding or in the crew. Captures made by crews, &c., of a national vessel, on board a vessel not belonging to the navy, are deemed to be made by non-commissioned captors.—(*Dos Hermanos*, 2 Wheaton, 98, and note, p. 505, citing 5 Rob., 51; Id., 280; 4 Rob., 282, note *a*.)

Or if the United States could not claim as captor under the decree, it was perfectly competent for it to contest the right of the captors after condemnation and before distribution. In the *Amiable Isabella*, 6 Wh., 1, the court said this could be done after condemnation, and before decree of distribution. Both condemnation and distribution were by the same decree in the case at bar, but the opinion of the court in

Andrew *vs.* Wall (3 How., 568) seems to extend this right to the time of actual distribution, and (p. 573) refers to the exercise of it as familiar practice in prize cases.

IV. *As to payment by the marshal.*

The marshal before making distribution should, for his own safety, have procured an order from the court, (Brig Gloucester, 2 Dall., 37,) and it is moreover the duty of the court to ascertain the persons entitled to a share of the proceeds.—(The St. Lawrence and Cargo, 2 Gallis, 20.) If, then, the other captors meant to contest the right of the United States to receive a moiety of the proceeds, they should have raised the objection before distribution, when the question could have been adjudicated by the proper tribunal. By acquiescence in the proceedings of the marshal, and especially by receiving their portion without objection, they have lost the right to recover against him, (Schooner Collector, 6 Wheat., 194,) and unless they could recover against the marshal no action will lie against the United States, who are contesting claimants, and between whom and the petitioners there is no priority of contract.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

CHARLES ST. JOHN CHUBB, EXECUTOR, AND OTHERS, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The petition states that on the 29th of April, 1814, the officers and crew of the United States sloop-of-war Peacock captured the British sloop-of-war Epervier, and conducted her into the port of Savannah; that she was there libelled, and decreed by the district court of the United States as prize of war to the captors, (see Exhibit A;) that the Epervier had on board certain specie, which was also decreed by said court as prize of war to the captors to be distributed, (see Exhibit A;) that the captors were the persons mentioned above, and the other officers and the crew; that the marshal, John Eppinger, after selling the Epervier and receiving the proceeds, made the mistake of paying one-half thereof, and one-half of the specie captured in the Epervier, into the treasury of the United States. The prayer of the petition is that this, their property, be restored to them.

The evidence is substantially as follows:

The record of the two suits mentioned in the petition as Exhibit A. This record shows the libel against the Epervier, her tackle, apparel, guns, and other implements of war; the warrant of arrest, and its return served; the monition, and its return served. It also shows proof of the capture of the Epervier by the Peacock, as alleged in the petition; three separate defaults, and the following decree rendered on the 1st of August, 1814, viz:

“The United States vessel-of-war Peacock, commanded by Lewis

Warrington, esq., captured his Britannic Majesty's ship-of-war *Epervier*, and brought her into this port; she has been libelled by the district attorney. The usual monition has been published, and proclamation made, and defaults duly recorded. No claimant appearing, it is ordered, adjudged, and decreed, that the said sloop-of-war *Epervier*, her tackle, apparel, guns, and other implements of war, be condemned as prize of war to the captors, and sold after due notice by the marshal, and the proceeds be distributed, as the law directs respecting captures made by the public armed vessels of the United States, after payment of costs and charges."

The record aforesaid also shows a libel against the specie mentioned in the petition, viz: \$117,903; the warrant of arrest, and its return served; the monition, and its return served; and the following decree rendered on the 10th of June, 1814, viz:

"The United States vessel-of-war *Peacock*, commanded by Lewis Warrington, esq., in the late capture of his Britannic Majesty's sloop-of-war *Epervier*, brought to this port, captured, also, in dollars, one hundred and seventeen thousand nine hundred and three dollars, which has been libelled by the district attorney. The usual monition has been published, and proclamations made, and the defaults duly recorded. No claimant appearing, it is ordered, adjudged, and decreed, that the said sum of \$117,903 be condemned as prize of war to the captors, to be distributed, as the law directs on captures made by the public armed vessels of the United States, after payment of costs and charges."

It also appears that the marshal paid (costs deducted) one-half of said specie, namely, \$58,904 59 into the Planter's Bank, at Savannah, on account of the Treasurer of the United States; the last part of the payment being made August 18, 1814.

It appears, by a letter of the Secretary of the Navy, (Exhibit B,) dated March 4, 1814, that the *Peacock* rated 18 guns.

According to Captain Warrington's official account of the capture, dated April 29, 1814, (Exhibit C,) the *Epervier* mounted 18 thirty-two pound carronades, and had 128 men.

Lieutenant Nicholson, on May 1, 1814, (Exhibit D,) informs the Secretary of the Navy of his arrival at Savannah, in the *Epervier*, "of 18 thirty-two pound carronades."

Exhibit E is a letter from the Secretary of the Navy to the district attorney at Savannah, enclosing an opinion of the Attorney General relative to the marshal's claim of a commission on the specie decreed to the captors of the *Epervier*.

Exhibit F is a letter from the Secretary of the Navy to Lewis Warrington, dated June 11, 1814, in which he says: "In respect to your prize, the *Epervier*, the department is disposed, after she shall have gone through the regular ordeal of the district court, to purchase her for the public service at her fair and full value."

Exhibit G is a letter from the Secretary of the Navy to the navy agent, Savannah, dated June 15, 1814, which, after saying that the department has no charge of prize vessels until purchased by it, says: "It is, however, proper that the prize and her stores should be preserved in good order for the benefit of the captors. Lieutenant Wal-

pole, however, will send you any necessary assistance in men, and I presume Captain Warrington has left an agent to represent the interest of the captors, and to whom you will apply for whatever may be required."

Exhibit H is a letter from the Secretary of the Navy to the navy agent, Savannah. The Secretary here says: "I regret that no agent for the captors has yet appeared to negotiate with this department for the sale of the *Epervier* at an equitable and liberal price, which I am disposed to give, and which, by agreement of the parties, the court would have sanctioned. There appears, however, no alternative but a public sale, at which there will be no real bidder but the public at anything like her value; and justice to the captors forbids that she should be sacrificed. I have, therefore, determined upon the highest price which I feel myself authorized to go in the purchase of the *Epervier* for the service of the United States. You are therefore hereby authorized to purchase the *Epervier* at public sale, at a sum not exceeding \$55,000, including in the purchase all her armament," &c.

Exhibit I is the marshal's account of the sale of the *Epervier*, her tackle, &c., to the United States for \$55,000; of which sum the marshal paid into the treasury of the United States \$26,796 25, being one-half of the net proceeds of the sale.

Exhibit K gives copies of decrees in the cases of *The United States of America and the officers and crew of the United States vs. The Frigate Macedonian*, her tackle, apparel, and furniture, arms, stores, and ammunition; and of *The United States of America and the officers and crew of the United States frigate Constitution vs. The Ship Cyane*, her armament, tackle, apparel, furniture, and stores.—(State Papers, Naval Affairs, 418.)

Exhibit L contains a reference to authorities.

Exhibit M is the following letter from the Navy Department to the chairman of the Committee on Naval Affairs of the 21st November, 1812:

"SIR: In order to enable the committee to form a satisfactory opinion as to the compensation to be provided for the officers and crew of the frigate *Constitution*, for the capture and subsequent destruction of the British frigate the *Guerriere*, I have the honor to state to you that the *Constitution* rated forty-four and mounted fifty-five guns; that the *Guerriere* rated thirty-eight and mounted fifty-four guns. The *Guerriere*, although entirely dismantled, &c. * * *

"PAUL HAMILTON.

"Hon. B. BASSETT."

Exhibit N is a resolution of Congress relative to the victory of the *Peacock* over the *Epervier*.

We have now set out the substance of the evidence. The claimants were the captors of the *Epervier*. The prize money amounted to \$171,401 68; one-half of which was paid by the marshal to the claimants, and the other half to the United States. The claimants contend that they were entitled to the whole of the \$171,401 68, and they bring this suit to recover from the United States the one-half of

that sum, which one-half was illegally (as they say) paid to the United States by the marshal in 1814.

They rest their claim on two grounds :

First. That as the decrees condemn the *Epervier* and the specie as prize to the captors, the whole amount was thus vested in the claimants.

Secondly. That independently of that effect of the decrees, the claimants were entitled by law to the whole, because the *Epervier* was of equal or superior force to the *Peacock*.

As to the first question : The decree in the first suit condemns the *Epervier*, her tackle, apparel, guns, and other implements of war, as prize of war to the captors. In order to ascertain the effect of that decree we must look to the allegations of the libel and to what decree of condemnation the court had authority to render. The libel against the ship was substantially as follows : That the libellant, Lewis Warrington, commander of the United States sloop-of-war *Peacock*, on behalf as well of the United States as of himself and the officers and crew, alleges that war existed between the United States and Great Britain, and that captures of enemies' property were enjoined on all officers of the United States ; that the libellant, therefore, with said sloop-of-war, her officers, and crew, on the 29th of April, 1814, captured on the high seas the British sloop-of-war *Epervier*, her apparel, &c., which was at the time commanded by a British officer, and was sailing under the British flag ; that the *Epervier*, therefore, became forfeited. Prayer that the *Epervier*, her tackle, &c., may be attached, the persons interested cited, and that by the definitive decree of the court she be condemned as forfeited, to be distributed as by law is provided respecting the captures made by the public armed vessels of the United States.

Those facts contained in the libel make out a case for a decree of condemnation against the *Epervier* as prize of war to the United States ; and that is all. To entitle the officers and crew of the *Peacock* to the whole of the property, they would have to allege and prove that the *Epervier* was of equal or superior force to the *Peacock*. There was no allegation before the court relative to the force of either of the vessels, and, of course, the question as to whether the officers and crew of the *Peacock* were entitled to the whole or only the one-half of the prize or its proceeds, was not before the court, and they therefore had no authority to decide it. The capture was by a public armed ship belonging to the United States ; and the officers and crew were employed and paid by the United States. In the case of such a capture, the only proper libel to be filed is a libel in the name of the United States showing the legality of the capture ; and the only proper decree of condemnation in such case is, that the captured ship be condemned as prize of war to the United States. Even in England, where the captors, in the case of captures by national ships, take the whole of the prize, the libel is in the name of the king ; and the decree of condemnation is, that the ship be adjudged and condemned as good and lawful prize to the king.— (Marriott's Formulary, 159, 198.) " It is an elementary principle of prize law (says Mr. Wheaton) that all rights of prize belong originally to the government, (the Melo-

masne, 4 Rob., 4,) and the beneficial interests derived to others can proceed only from the grant of the government, and therefore all captures, wherever made, enure to the use of the government, unless they have been granted away.—(The *Elzebe*, 5 Rob., 173; *Sterling vs. Vaughan*, 11 East., 619; *The Maria Francaise*, 6 Rob., 282; *The Joseph*, 1 Gallis, 545.) In cases of public armed ships, duly commissioned for the capture, the condemnation is always to the government, but the proceeds are to be distributed according to the act of the 23d April, 1800, ch. 33, sec. 5 and 6.”—(2 Wheat. Rep., Appendix, 71, 72.)

It is not until after the decree of condemnation to the United States in these cases that the inquiry is presented to the court as to the relative force of the two vessels, and as to the disposition of the proceeds of the prize.

The above observations, made with respect to the decree of condemnation against the captured vessel, apply to the decree against the specie which she had on board.

We think, therefore, that since the question as to how much the claimants were entitled to was not before the district court, the said decrees do not prevent us from examining the question. That question, (the second one in the cause,) namely, whether the claimants were entitled to the whole of said sum of \$171,401 68 on the ground that the *Epervier* was of equal or superior force to the *Peacock*, does not appear to be a difficult one to decide.

The act of Congress on the subject is as follows :

“That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors, and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.”—(2 Stat. L., 52, sec. 5.)

The allegation in the petition is that the two vessels carried each 18 guns, and were, therefore, of equal force. Captain Warrington’s official report of the capture, dated April 29, 1814, says that the *Epervier* rated and mounted 18 thirty-two pound carronades, and had 128 men. Lieutenant Nicholson, on his arrival at Savannah with the prize, says, in his report dated May 1, 1814, that the *Epervier* was a brig of 18 thirty-two pound carronades. The following communications are from the Secretary of the Navy :

“NAVY DEPARTMENT, *May 7, 1785.*

“SIR : In reply to your letter of the 30th ultimo, desiring information touching the comparative tonnage or size of the British sloop-of-war *Epervier* and the United States ship *Peacock*, weight of metal, and strength of the crews at the time of the capture of the former by the latter named vessel, I have to state that it appears that the *Epervier* was a brig of 18 guns—16 thirty-two-pounders and 2 eighteen-pounder carronades—and had a crew of 128 men. The *Peacock* was a ship of 22 guns—2 long 12s and 20 thirty-two-pounder carronades—

and had a crew of 160 men. So far as the department is aware, the above are all the facts in the points referred to shown by its records.

"Very respectfully, your obedient servant,

"I. TOUCEY.

"JOHN D. MCPHERSON, Esq.,

"Deputy Solicitor Court of Claims."

"NAVY DEPARTMENT, *January 12, 1859.*

"SIR: Your letter of the 6th instant has been received. You are informed, in reply, that all the '32-pounders' on the Epervier were carronades, but the long 12s on the Peacock were not.

"I am, respectfully, your obedient servant,

"ISAAC TOUCEY.

"JOHN D. MCPHERSON, Esq.,

Deputy Solicitor Court of Claims."

There can be no doubt, from this evidence, but that the force of the Peacock was considerably greater than that of the Epervier. She had more guns, and thirty-two men more than the Epervier. The Peacock had twenty-two guns, twenty of which were thirty-two-pounder carronades, the other two were long 12s. The Epervier had in all but eighteen guns, sixteen of which were thirty-two pounder carronades, the other two were eighteen-pounder carronades. The Peacock had one hundred and sixty men, and the Epervier only one hundred and twenty-eight men. The consequence is, that, according to said act of Congress, the officers and crew of the Peacock were only entitled to one-half of the proceeds of the sale of the Epervier, and one-half of the specie found on board of her. That amount was paid to them by the marshal in 1814, soon after the decrees of condemnation were rendered. They have, therefore, in our opinion, no cause of action.

